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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE ANGUIANO,

Defendant and Appellant.

B219343

(Los Angeles County
Super. Ct. Nos. BA344272, BA345913,
BA354709)

APPEAL from a judgment of the Superior Court of Los Angeles County Anne H. Egerton, Judge. Affirmed.

Jennifer Hansen, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Linda C. Johnson, Supervising Deputy Attorney General, Robert David Breton, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

In Los Angeles County Superior Court case number BA344272, the Los Angeles County District Attorney filed an information charging defendant and appellant Jose Anguiano with assaulting Andrew C. by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1)¹), assaulting Jose C. with a firearm (§ 245, subd. (a)(2)), and being a felon in possession of a firearm (§ 12021, subs. (a)(1)). The information also alleged that defendant committed the charged offenses at the direction of, for the benefit of, and in association with a criminal street gang with the specific intent to promote, further, and assist in criminal conduct by gang members (§ 186.22, subd. (b)(1)), and that defendant suffered a prior conviction within the meaning of the Three Strikes law (§ 667, subds. (b)-(i)). With respect to the two assault offenses, the information alleged that defendant suffered a prior conviction within the meaning of section 667, subdivision (a)(1). With respect to the assault with a firearm offense, the information alleged that defendant personally used a firearm. (§ 12022.5.)

The jury found defendant guilty of assaulting Andrew C. by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)) and found true the accompanying gang allegation (§ 186.22, subd. (b)(1)). The jury was unable to reach a verdict on the assault with a firearm and felon in possession of a firearm charges. The trial court declared a mistrial as to those charges and dismissed them pursuant to section 1385. Trial on the prior conviction allegations was bifurcated, and defendant admitted the allegations. The trial court sentenced defendant to state prison for 14 years.

In Los Angeles County Superior Court case number BA345913, defendant pleaded no contest to possession of an illegal substance—cocaine base—in a jail facility. (§ 4573.6.) In Los Angeles County Superior Court case number BA354709, defendant pleaded no contest to possession of an illegal substance—methamphetamine—in a jail facility. (§ 4573.6.) The trial court sentenced defendant to consecutive one-year terms in

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All statutory citations are to the Penal Code unless otherwise noted.

state prison in case numbers BA345913 and BA354709. Accordingly, defendant was sentenced to a total term of 16 years in state prison.

On appeal, defendant contends that the trial court erred in case number BA344272 by admitting cumulative and prejudicial gang evidence. We affirm.

BACKGROUND²

The Underlying Offenses

On June 20, 2008, Jose and Yolanda C. and their son, 17-year-old Andrew C., attended a birthday party for the C.'s goddaughter. Fifteen-year-old Beatriz Z., a C. family friend, also attended the party. About 9:40 p.m. or 10:00 p.m., Andrew and Beatriz walked up the street to Montecito Park. A fair was being held at the park, and it was movie night. As Andrew and Beatriz walked past the gym, defendant, whom Beatriz knew as "Drowsy," approached Beatriz and said, "Hi." Defendant asked Beatriz who Andrew was, and, because she did not want any problems, Beatriz responded that Andrew was her cousin.

Defendant asked Andrew where he was from. Andrew interpreted the question as inquiring whether Andrew was in a gang. Andrew felt threatened by the question, and answered, "L.O.M." L.O.M., an acronym for "Loving Our Mankind," was a skate group to which Andrew belonged and that skated at and cleaned up skate parks. Defendant responded, in an angry tone, "Avenues 43 and you better know where you're at." Andrew had grown up in that neighborhood and believed Avenues 43 to be a criminal street gang. Defendant then attacked Andrew, punching and kicking him. Defendant struck Andrew on the head, left shoulder, and rib cage. Andrew did not fight back. At some point, the park coordinator separated defendant and Andrew. Andrew ran away and defendant chased him.

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Defendant's claim on appeal concerns his conviction in case number BA344272. Accordingly, we limit our recitation of facts to that case.

About 10:00 p.m., Andrew ran back to the party. Andrew saw his father who was standing in the front yard and yelled, “Dad, dad, this guy’s trying to drop me.” Andrew ran inside the house. Jose stepped between Andrew and defendant. Defendant confronted Jose.

Defendant asked Jose “who that kid was.” Jose said his son. Defendant said, “Well then I’m going to drop you,” and hit Jose in the eye. Jose fell back and said, “It doesn’t have to go down like this.” Defendant kept yelling, “Oh, well this is 43rd, 43rd.” Defendant also twice yelled, “This is Avenues 43.” Defendant pulled a gun from his belt or pants and struck Jose on the lip, causing Jose’s lip to bleed. Jose believed the gun looked like a revolver.

The Gang Enhancement

On December 4, 2007, Los Angeles Police Department Officer Fernando Salcedo came in contact with defendant. Officer Salcedo asked defendant about his gang membership. Defendant told him he was from Avenues and that his moniker was “Moreno.”

On December 9, 2007, Los Angeles Police Department Officer Myra Correa observed defendant writing on a garage door. Defendant was with another male Hispanic. Defendant and his companion made eye contact with Officer Correa and her partner and ran. When apprehended, defendant had blue spray paint on his fingers that matched the spray paint on the garage door. The graffiti on the door said, “Avenues 43.” Graffiti in the same color spray paint on a nearby fence said, “Avenues 43” and “Drowsy.”

On August 9, 2008, Los Angeles Police Department Officer Kelly Edwards arrested defendant. Defendant admitted to Officer Edwards that he was a member of the Avenues gang, but stated that he was looking for work and was not associating with the gang. Defendant told Officer Edwards that his moniker was “Moreno.” In a contact in the year prior to his arrest, defendant admitted to Officer Edwards that he was a member of the Avenues gang and stated that his moniker was “Moreno.”

Los Angeles Police Department Detective Ernest Garcia searched defendant's family's apartment. Detective Garcia found a notebook and a social security card in defendant's name on a dresser in one of the bedrooms. Inside the notebook was a handwritten letter bearing the name "Drowsy 43."

On August 24, 2008, Deputy Sterling Haley, was assigned to move defendant from his then current jail cell to another cell. Deputy Haley noticed a lot of Avenues gang graffiti in defendant's cell. The graffiti included, "Aves 43," "43rd Drowsy," and "Avenues 43, Drowsy."

Los Angeles Police Department Officer Curtis Davis testified as the prosecution's gang expert. Officer Davis was assigned to work with the Avenues gang. According to Officer Davis, there are about 650 documented Avenues gang members. The gang uses different comic imagery as symbols of the gang, including a skull and fedora with a bullet hole in the skull. The primary activities of the Avenues gang are shooting at police officers, murder, the sale of narcotics, robbery, and assault. "Where are you from?" is a challenge gang members use to determine a person's gang membership. A violent act usually follows the inquiry. According to Officer Davis, Montecito Park is located at the border of Avenues gang territory. In 2007, Officer Davis documented Avenues gang graffiti in Montecito Park.

Officer Davis testified that Daniel ("Mr. Clever") Leon was an Avenues gang member. On February 22, 2008, Leon was involved in the murder of a "Cypress Parker." Leon fled and was followed by undercover officers. At some point, Leon engaged in a gun battle with the officers using an AK47 automatic assault rifle. Leon was killed in the battle.

Officer Davis did not know defendant personally, but "familiarized" himself with defendant prior to testifying. Officer Davis discussed defendant with fellow officers and reviewed field interview cards. Officer Davis opined that defendant is an Avenues gang member. According to Officer Davis, defendant is on the service list for a permanent injunction for the Avenues gang. Testifying based on hypothetical questions using the facts of this case, Officer Davis opined that the assaults in Montecito Park and in front of

the house benefitted the Avenues gang. The acts had the effect of terrifying the community.

Officer Davis testified that Steve “Bandit” Berriozabal is a member of the Avenues Drew gang. The jury was shown photographs of Avenues gang tattoos on Berriozabal’s abdomen, arm, and shaved head. Officer Davis testified that Jorge Reyes is an admitted Avenues gang member. The jury was shown photographs of Avenues gang tattoos on Reyes’s head, neck, and abdomen. On September 16, 2008, Berriozabal and Reyes were convicted in case number BA329101 of two robberies that were committed on December 16, 2007, with gun use and gang allegations found true as to both robberies.

Officer Davis testified that Eric “Bandit” Valderrama is an admitted Avenues 57 gang member. The jury was shown photographs of Avenues gang tattoos on Valderrama’s shoulders, back, and leg. In case number BA316482, Valderrama was convicted of robbery and assault with a firearm with gun use and gang allegations for offenses that took place on September 20, 2006.

Defense Case

Defendant’s mother, Victoria Anguiano, testified that she and her children were at Montecito Park on June 20, 2008. Defendant was playing basketball in the gym. Defendant’s mother testified that as she was preparing to leave, she saw defendant leaving the gym. Defendant’s mother also saw a couple walking. Defendant “greeted the girl and she greeted him back.” As defendant’s mother approached defendant, she saw “that the guy hit my son and pushed him.” Defense counsel argued self-defense as to the assault of Andrew, and misidentification as to the assault of Jose.

DISCUSSION

Defendant contends that the trial court abused its discretion in admitting cumulative, irrelevant, and prejudicial gang evidence. This “overwhelming” gang evidence, defendant contends, violated his right to due process and rendered his trial

unfair. The trial court did not abuse its discretion in admitting the gang evidence, and any error in its admission was harmless.

“Only relevant evidence is admissible” (*People v. Harris* (2005) 37 Cal.4th 310, 337; Evid. Code, §§ 210, 350.) Evidence is relevant if it “tends ‘logically, naturally, and by reasonable inference’ to establish material facts such as identity, intent, or motive.” [Citation.]” (*People v. Harris, supra*, at p. 337.) Trial courts have broad discretion in determining whether evidence is relevant (*ibid.*), and we review a trial court’s ruling on the admissibility of evidence for an abuse of that discretion (*People v. Waidla* (2000) 22 Cal.4th 690, 717). Under Evidence Code section 352, a trial court may, in its discretion, exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate the undue consumption of time or create a substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. “Evidence is not ‘unduly prejudicial’ under the Evidence Code merely because it strongly implicates a defendant and casts him or her in a bad light Instead, undue prejudice is that which ‘uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues.’ [Citations.]” (*People v. Robinson* (2005) 37 Cal.4th 592, 632, footnote omitted.)

“Absent fundamental unfairness, state law error in admitting evidence is subject to the traditional *Watson* test: The reviewing court must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error.” (*People v. Partida* (2005) 37 Cal.4th 428, 439, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.) “[T]he admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*.” (*People v. Partida, supra*, 37 Cal.4th at p. 439.) Due process violations are reviewed for prejudice under the harmless beyond a reasonable doubt standard in *Chapman v. California* (1967) 386 U.S. 18, 24. (*People v. Albarran* (2007) 149 Cal.App.4th 214, 229, citing *People v. Boyette* (2002) 29 Cal.4th 381, 428.)

To prove a gang enhancement allegation under section 186.22, “the prosecution must prove that the crime for which the defendant was convicted had been ‘committed

for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.’ (§ 186.22, subd. (b)(1) and former subd. (c).) In addition, the prosecution must prove that the gang (1) is an ongoing association of three or more persons with a common name or common identifying sign or symbol; (2) has as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute; and (3) includes members who either individually or collectively have engaged in a ‘pattern of criminal gang activity’ by committing, attempting to commit, or soliciting *two or more* of the enumerated offenses (the so-called ‘predicate offenses’) during the statutorily defined period. (§ 186.22, subds. (e) and (f).)” (*People v. Gardeley* (1996) 14 Cal.4th 605, 616-617.) Apart from a gang enhancement allegation, “[e]vidence of the defendant’s gang affiliation—including evidence of the gang’s territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. [Citations.]” (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.)

The evidence that the trial court admitted in connection with the gang enhancement allegation consisted of evidence that defendant was a member of the Avenues gang who went by the moniker “Drowsy,” evidence that the Avenues gang is a criminal street gang, and evidence that defendant committed the charged offenses for the benefit of the Avenues gang. The evidence that defendant was a member of the Avenues gang who went by the moniker “Drowsy,” thus establishing defendant’s identity and showing a motive for and intent to commit the charged offenses for the benefit of the gang, consisted of evidence of defendant’s prior contacts with the police when he admitted that he was a member of the Avenues gang with the moniker of “Moreno” and when he spray painted Avenues gang graffiti and his moniker “Drowsy” on a garage door; a letter found in defendant’s home which bore the name “Drowsy 43”; Avenues gang graffiti in defendant’s jail cell that included his moniker “Drowsy”; and the inclusion of defendant’s name on a service list for a permanent injunction for the

Avenues gang. The trial court did not abuse its discretion in admitting this evidence because the evidence was relevant to defendant's identity and motive for and intent to commit the charged offenses and its probative value outweighed any prejudicial effect. (*People v. Hernandez, supra*, 33 Cal.4th at p. 1049; *People v. Williams* (1997) 16 Cal.4th 153, 193.)

The evidence that the Avenues gang was a criminal street gang consisted of testimony from a gang expert that there are about 650 documented Avenues gang members; the gang uses symbols such a skull with a bullet hole and a fedora; and the gang's primary activities are shooting at police officers, murder, the sale of narcotics, robbery, and assault. The gang expert established the gang's predicate offenses through testimony about crimes committed by Berriozabal, Reyes, and Valderrama whose Avenues gang membership the expert established, in part, through their convictions for gang-related offenses and photographs of their gang tattoos. Such evidence was relevant (*People v. Gardeley, supra*, 14 Cal.4th at pp. 616-617) and its probative value outweighed any potential undue prejudice (*People v. Robinson, supra*, 37 Cal.4th at p. 632).

Evidence that defendant committed the offenses for the benefit of the Avenues gang consisted of testimony from the gang expert that the inquiry "Where are you from?" is a challenge that gang members use to determine a person's gang membership and that usually is followed by a violent act; testimony from the gang expert that Montecito Park is located at the border of Avenues gang territory; photographs showing Avenues gang graffiti in Montecito Park; and the gang expert's testimony that the assaults in Montecito Park and in front of the house benefitted the Avenues gang. This evidence was relevant (*People v. Gardeley, supra*, 14 Cal.4th at pp. 616-617) and its probative value outweighed any potential undue prejudice (*People v. Robinson, supra*, 37 Cal.4th at p. 632). Apart from its relevance to the gang enhancement allegation, evidence that defendant assaulted Andrew for the benefit of the Avenues gang indicated that defendant was the aggressor and ultimately dispelled any defense of self-defense. (See *People v.*

Hernandez, supra, 33 Cal.4th at p. 1049.) It might also have some possible relevance to the identity of Jose's assailant. (*Ibid.*)

Defendant appears to argue that the prosecution is limited to presenting only the barest minimum evidence necessary to establish each element of the substantive offenses and the street gang allegations. In this regard, defendant argues that "[p]rosecutors do not have the right to over-prove their case or put on all the evidence that they have."

Defendant does not cite any authority that a trial court abuses its discretion by permitting the prosecution to introduce evidence beyond the minimum necessary to establish its case.

Even assuming that the trial court abused its discretion in admitting cumulative gang evidence, any such error was harmless under any standard. Two eyewitnesses identified defendant as the person who assaulted Andrew in Montecito Park and provided evidence that the assault was gang-related. Beatriz testified that when she and Andrew went to the park, defendant whom she knew, greeted her, and then said to Andrew, "Where are you from?" Beatriz understood defendant to be asking about Andrew's gang affiliation. Defendant then hit Andrew in the face and kicked him in the stomach. Andrew did not attempt to hit defendant and only pushed off defendant to protect himself. Andrew's testimony was consistent with Beatriz's testimony. Andrew testified that he and Beatriz went to the park, defendant spoke with Beatriz, and defendant asked Andrew where he was from. When Andrew responded, defendant said, "Avenues 43 and you better know where you're at." Defendant then attacked Andrew, hitting and kicking him in the head, shoulder, and rib cage. Andrew did not fight back. Beatriz's and Andrew's testimony is substantial evidence of defendant's guilt for assaulting Andrew and substantial evidence that the assault was gang-related. Given such substantial evidence, it is beyond reasonable doubt the jury would have convicted defendant of assaulting Andrew and, considering other gang evidence, would have found true the gang allegation even if the trial court had not admitted some of the purported cumulative gang evidence.

Moreover, in closing argument, defense counsel essentially conceded the altercation between defendant and Andrew, but argued that defendant struck Andrew in self-defense. Defense counsel also essentially conceded that defendant was a gang member, but argued that that did not necessarily mean that the altercation was gang-related. In this regard, defense counsel told the jury that this case was not a gang case, but rather a case about two boys who got into a fight over a girl. Defense counsel stated that defendant's mother testified that she saw Andrew strike defendant and that defendant had an "absolute right to defend" himself. Defense counsel stated, "Is it reasonable that they are going to fight over a girl? Of course it is. [¶] Is it reasonable that he defended himself? Of course it is." Defense counsel acknowledged that the jury had been presented with "a lot" of evidence about defendant's affiliation with a gang and said that he would not tell the jury that defendant "doesn't have ties to this gang." But, defense counsel argued, not everything a gang member does is for the benefit of a gang. "People are allowed to have personal conflicts with one another and just because he's a gang member doesn't mean that he did so for the benefit of the gang."

Finally, the trial court instructed the jury regarding the limited purpose for which the gang evidence was admitted. That the jury did not improperly consider the gang evidence is plain from its inability to reach a verdict on the remaining charges against defendant. One fairly may conclude that had the jury been swayed improperly by the gang evidence, it would also have convicted defendant of assaulting Jose and being a felon in possession of a firearm.

DISPOSITION

The judgment is affirmed.

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MOSK, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.